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In the Supreme Court

OF THE

United States

OCTOBER TERM 1958

No. [redacted] 87

STATES MARINE CORPORATION OF DELAWARE, a Corporation,
Petitioner,

vs.

ARMIDA ALDRIDGE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Petitioner States Marine Corporation of Delaware prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered in the above-entitled case on April 23, 1959.

OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the Northern District of California, Southern Division

(Edward P. Murphy, District Judge) as contained in an Order dated July 2, 1957 dismissing plaintiff's complaint is unofficially reported in 1957 A.M.C. 1699. See also Transcript of Record, pp. 33-36. The United States Court of Appeals for the Ninth Circuit (Chief Judge Pope and Circuit Judges Healy and Hamley) rendered an opinion on March 16, 1959, which was withdrawn and replaced by an opinion dated April 23, 1959. The opinion of March 16 will not be published, but the opinion of April 23 will be published on June 8, 1959, in Volume 265 of the Federal Reporter, Second Series, page not yet known. Both opinions of the Court of Appeals are set forth in the Appendix to this Petition.

JURISDICTION.

The jurisdiction of the District Court was invoked because of diversity of citizenship, the plaintiff being a citizen of California and the defendant a Delaware corporation; the amount in controversy was $150,000. 28 U.S.C. §§ 1332, 1441 (1952).

The judgment of the United States Court of Appeals for the Ninth Circuit sought to be reviewed was dated and entered on April 23, 1959. The Court of Appeals for the Ninth Circuit originally rendered an opinion in this case on March 16, 1959, but the earlier opinion was withdrawn and the opinion and judgment of April 23, 1959 was substituted therefor.[1] Rehearing was also denied on April 23, 1959. On April 28, 1959, mandate upon the

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[1] The opinion of April 23, 1959 was itself amended by the Court of Appeals on May 7, 1959. See Appendix, p. iv.

judgment of April 23, 1959, was stayed by the Court of Appeals pending the filing of this petition for certiorari on or before June 1, 1959.

The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code.

QUESTIONS PRESENTED.

1. Can allegations of negligence resulting in the death of a longshoreman be deemed sufficient to require a case to proceed to trial in a District Court when the circumstances alleged in the complaint fail to state a valid claim under the laws of the state under whose wrongful death statute the action is brought?

2. Does the decision of this Court in *United Pilots Assn. v. Halecki* (1959), 358 U. S. 613, change the rule that a shipowner is not liable in negligence for harm to his business guests resulting from obvious dangers known to and created by them?

3. Does a shipowner's duty to provide a safe place to work include a duty to supervise the work methods used by longshoremen employed by an independent stevedoring contractor to prevent them from disregarding plain measures to be taken for their own safety?

4. Is it improper for a court to rule on a question of proximate causation in a case where the uncontroverted facts of an accident are admitted by the pleadings and the inferences to be drawn therefrom are not open to a reasonable difference of opinion?

THE STATUTE INVOLVED.

The plaintiff's action was based upon Section 377 of the California Code of Civil Procedure, the relevant portions of which read as follows:

> "When the death of a person not being a minor, or, when the death of a minor person who leaves surviving him either a husband or wife or child or children or father or mother, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured."

STATEMENT OF THE CASE.

Plaintiff, as the widow and heir of William J. Aldridge, commenced this action in the Superior Court for the City and County of San Francisco, and the case was removed to the United States District Court for the Northern District of California. The action was brought pursuant to the California wrongful death statute (Cal. Code Civ. Proc., sec. 377). Plaintiff sought to recover damages for the death of her husband, a longshoreman, who died as a result of injuries he received while working as an employee of the Schirmer Stevedoring Company in loading the SS LONE STAR STATE, a ship owned by the defendant, while the vessel was berthed at San Francisco.

The complaint alleged that when a load of dunnage weighing between one and two tons was intentionally

broken apart by being raised into the air by plaintiff's decedent and his fellow longshoremen, several heavy timbers fell upon him causing injuries which resulted in his death. According to the complaint the load of dunnage, which was strapped together by metal bands, had been lowered into the vessel's No. 3 hold to be used by the longshoremen in the course of their work. The plaintiff alleged that it became necessary for her decedent and his fellow longshoremen to break the metal bands, and that they did this by inserting the cargo hook in the bands "and thereafter raising the load of dunnage and attempting to break the steel bands by means of the weight of said dunnage, through raising the dunnage into the air and causing the weight thereof to break said straps."

The complaint as originally filed contained counts for both negligence and unseaworthiness. Plaintiff dropped the count for unseaworthiness, however, and filed an amended complaint based solely on averments of negligence. The charging allegation against the defendant was that it negligently failed to provide band cutters or some other proper means whereby the bands around the load of dunnage could be cut or broken.

The defendant moved to dismiss the amended complaint on the ground that it affirmatively appeared from the facts alleged by plaintiff that the asserted negligence of the shipowner was not the proximate cause of Aldridge's death. Defendant argued that even though the allegations of the amended complaint be viewed in a light most favorable to the plaintiff, they showed (a) that the work method which resulted in Aldridge's death, i.e.;

raising a heavy load intended to break apart and fall, was voluntarily selected by the decedent and his fellow longshoremen, (b) that this work method was patently dangerous and created an obvious risk of serious bodily harm to the decedent, and (c) that the shipowner's negligence, if any, in failing to provide band cutters was too remote to constitute a legally sufficient cause of Aldridge's death, which instead resulted solely from the dangerous work method used by employees of an independent contractor.

The District Court granted the defendant's motion to dismiss and, after full argument, denied the plaintiff's motion for reconsideration and for leave to file a second amended complaint. Plaintiff has never filed a draft of the proposed second amended complaint and neither in extensive argument nor subsequent briefing has plaintiff suggested any basis imposing liability on defendant other than the allegations of the first amended complaint.

Plaintiff appealed to the Court of Appeals for the Ninth Circuit, where the case was argued and submitted on April 8, 1958. On November 14, 1958 the Court of Appeals entered an Order Vacating Submission of Cause, noting that this Court had granted a petition for certiorari in *Halecki v. United New York & New Jersey S.H.P. Ass'n.* (2 Cir. 1958) 251 F. 2d 708, cert. granted, 357 U.S. 903, and that there were particulars in which the *Halecki* case resembled this one. The decision in *Halecki* was announced by this Court on February 24, 1959,[2] and on March 11, 1959 the Court of Appeals

[2] *United Pilots Assn. v. Halecki* (1959) 358 U.S. 613.

ordered this case re-submitted. On March 16, 1959 the Court of Appeals rendered the first of its two decisions in this case reversing the order of dismissal and remanding the case to the District Court for trial.

Defendant-appellee States Marine Corporation of Delaware filed a petition for rehearing on the ground, among others, that the Court of Appeals had failed in its decision of March 16, 1959 to give effect to the rule that the rights of the parties in an action brought under a state wrongful death statute are to be governed entirely by the laws of that state.[3] Rehearing was denied on April 23, 1959, but on that date the Court of Appeals withdrew its earlier opinion and in its place substituted the one now sought to be reviewed.

In response to the petition for rehearing the Court of Appeals deleted those portions of the opinion of March 16, 1959 which stated that the complaint must be judged in the light of "maritime law." It also withdrew its earlier holding that the decedent's contributory negligence —which appellee contended was shown as a matter of law by the allegations of the complaint—would operate only in mitigation of damages under the maritime rule, although it declined to construe the California law on this point on the ground that such an interpretation would be premature.[4]

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[3] *The Tungus v. Skovgaard* (1959) 358 U.S. 588.

[4] In the opinion of April 23, 1959 the Court of Appeals also retreated from a suggestion in its earlier opinion that the California wrongful death statute might permit recovery for unseaworthiness. (See Appendix, p. ix, n. 2.) The Court of Appeals later pointed out, properly, that whether the plaintiff's allegations would even measure up to an allegation of unseaworthiness is "a question we do not face here". (Appendix, p. v, n. 6.)

The Court of Appeals did not, however, change its view that a cause of action for negligence had been stated against the defendant shipowner on the basis of *Halecki v. United New York & New Jersey S.H.P. Ass'n.* (2 Cir. 1958), 251 F. 2d 708, rev'd on other grounds (1959), 358 U.S. 613. The decisions rendered by the Court of Appeals for the Ninth Circuit on March 16 and April 23, 1959 are both based on the assumption that this Court has approved the imposition on a shipowner of a duty to supervise the work methods used by longshoremen employed by an independent stevedoring contractor so as to produce negligence liability without regard to the degree of knowledge which the person harmed has of the dangers and risks inherent in such work methods. Accordingly, petitioner applied for a stay of mandate upon the decision of April 23, 1959 in order to seek a review of the matter by this Court. On April 28, 1959 the Court of Appeals for the Ninth Circuit ordered mandate stayed pending the disposition of this petition to be filed on or before June 1, 1959.

REASONS FOR GRANTING THE WRIT.

I.

THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION INVOLVING THE RELATIONSHIP OF MARITIME AND LOCAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

In rendering its decision of April 23, 1959, the Court of Appeals for the Ninth Circuit had before it two very recent decisions of this Court which bear directly on the issues here involved. *The Tungus v. Skovgaard* (1959)

358 U.S. 588, which was decided on February 24, 1959, concerned an action arising under the New Jersey Wrongful Death Act (N.J.S.A. 2A:31-1 through 6). This Court there held that the rights of the parties in such an action depend entirely upon the law of the state under whose wrongful death statute the action is brought.

United Pilots Assn. v. Halecki (1959) 358 U.S. 613 was decided the same day and also involved the New Jersey Wrongful Death Act. The main issue in that case was whether or not there could be recovery for the decedent's death under the doctrine of unseaworthiness, and it was held that the decedent was not a member of the class in whose favor the doctrine runs. Although the case was remanded for a new trial, this Court did indicate its approval of the negligence aspects of the decision of the Court of Appeals for the Second Circuit under review. In delivering the majority opinion Mr. Justice Stewart stated (358 U.S. at pp. 618-619):

> "As to the claim based upon negligence, for which the New Jersey Wrongful Death Act clearly gives a right of action, we agree with the Court of Appeals that 'the evidence created an issue that could be decided only by a verdict.' The defendants owed a duty of exercising reasonable care for the safety of the decedent. They were charged with the knowledge that carbon tetrachloride was to be used in the confined spaces of the engine room. It was for the triers of fact to determine whether the defendants were responsibly negligent in permitting or authorizing the method or manner of its use."

Relying upon "sharp resemblances" between the facts in *Halecki* and those alleged in the complaint here in-

volved, the Court of Appeals for the Ninth Circuit reasoned that the decision in *Halecki* likewise requires the negligence issues raised by the plaintiff's complaint to be determined only by a jury. *But the Court of Appeals for the Ninth Circuit did not and could not reach this conclusion as a matter of state law.*

It is well settled in California that a complaint which discloses that harm occurred as a result of an obvious danger fails to state a cause of action. *Shanley v. American Olive Co.* (1921) 185 Cal. 552, 197 Pac. 793; *Hauser v. Pac. G. & E. Co.* (1933) 133 Cal. App. 222, 23 P. 2d 1068; *Royal Ins. Co. v. Mazzei* (1942) 50 Cal. App. 2d 549, 123 P. 2d 586. Defendant's motion to dismiss, made pursuant to Fed. Rules Civ. Proc. 12 (b) (6) for failure to state a claim upon which relief could be granted, was proper under the *Skovgaard* doctrine because the law of California applicable to determine the rights of the parties in this action precluded any recovery.

For reasons stated elsewhere in this petition, the petitioner will show that the *Halecki* case has led to an erroneous conclusion by the Court of Appeals for the Ninth Circuit on the negligence questions involved in this case. To the extent, however, that *Halecki* can be read to form a basis for negligence liability which is precluded by the law of the state under whose wrongful death statute the action is brought, an independent reason exists for allowance of the writ sought by this petition. Petitioner respectfully requests, therefore, that this Court review the decision rendered by the Court of Appeals for the Ninth Circuit on April 23, 1959 for the purpose of settling the important and unresolved question whether

the *Halecki* case constitutes an inroad on the *Skovgaard* principle that the federal courts must enforce rights created by a state wrongful death statute entirely in accordance with the laws of that state.

II.

APPLICATION BY THE COURT OF APPEALS OF THIS COURT'S RECENT DECISION IN THE HALECKI CASE HAS RESULTED IN A NOVEL BASIS FOR NEGLIGENCE LIABILITY SO FAR IN CONFLICT WITH ACCEPTED LEGAL PRINCIPLES AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF REVIEW.

In every case involving injury or death of an employee of an independent contractor occurring in the course of his work on a vessel, the negligence liability of the defending shipowner will necessarily depend on the extent to which *Halecki* may be deemed to have imposed new duties on the shipowner.

The *Halecki* case as now interpreted by the Court of Appeals for the Ninth Circuit stands for the proposition that a shipowner owes a duty to the employees of an independent contractor to exercise continued supervision over the methods by which they perform their work on his vessel. The extent of this duty is said to be such that the shipowner can be liable for harm to these persons caused by the method in which they perform their work, notwithstanding the fact that the harm in question resulted from risks which they knew and created.

Petitioner respectfully urges that this proposition is far too broad. Although it has become commonplace to

find expanding concepts of vessel liability in maritime personal injury actions, we are not here dealing with the "special features" of a statutory negligence action which may impose "far more drastic" duties on an employer in a master-servant situation than those existing in an ordinary negligence case.[6] Nor does this case involve elements of non-fault liability under the doctrine of unseaworthiness. Instead, the shipowner's asserted liability in this case depends solely upon the application of essentially common law principles pertaining to business guests as enforced through a state wrongful death statute.

The opinion of the Court of Appeals for the Second Circuit on the negligence aspects of *Halecki* is based upon the Restatement of Torts, Vol. II, § 344, which reads as follows:

> "A possessor of land who holds it open to the entry of the public for his business purposes is subject to liability to members of the public entering for such purposes for bodily harm caused to them by his failure to exercise a reasonably careful supervision of the appliances or methods of an independent contractor or concessionaire whom he has employed or permitted to carry on upon the land an activity which is directly or indirectly connected with his business use thereof."

There is no question that the reasonably careful supervision required under this section must be exercised for

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[5] E.g., the Jones Act, 37 Stat. 1185 (1915), as amended, 41 Stat. 1007 (1920), 46 U.S.C. §688 (1952).

[6] The quoted phrases are from Mr. Justice Brennan's opinion in *Rogers v. Missouri Pacific R. Co.* (1957), 352 U.S. 500 at pp. 507, 509.

the protection of members of the public entering the premises for business purposes during the entire period while the independent contractor carries on his activities. This is of course expressly stated in Section 344, Comment b. But there is also no question that the rule stated in this section makes a clear distinction between the "independent contractor or concessionaire" who creates the risk and other "members of the public," unaware of that risk, who may lawfully enter the premises and suffer harm.

Possibly the facts in the *Halecki* case may have justified an application of Section 344 of the Restatement of Torts on the ground that the decedent there was a member of the public lawfully entering the premises, and the dangerous condition, i.e., inadequate ventilation, was a risk neither apparent to nor created by him. The difficulty, however, is that neither the opinion of the Court of Appeals for the Second Circuit nor the opinion of this Court in *Halecki* deals with this distinction.[7] As a result the Court of Appeals for the Ninth Circuit has given *Halecki* the broadest possible interpretation: it has applied that case to impose upon a shipowner the duty to exercise with respect to longshoreman employees of independent stevedoring contractors a supervisory responsibility to prevent them from disregarding the plain measures to be taken for their own safety. It has used *Halecki* to sup-

[7]In this connection the petitioner in *Halecki* likewise did not suggest that this distinction should have been made. Its entire argument on the negligence aspects was devoted to the proposition that the respondent failed to establish the existence of a defective condition in the first instance. See Brief for the Petitioner, pp. 56-60, *United Pilots Assn. v. Halecki* (1959) 358 U.S. 613.

port a claim of negligence liability in a situation where the plaintiff's allegations show that the type of risk involved was apparent to and created by the person harmed and his fellow employees of an independent contractor.

Petitioner respectfully submits that this application of the *Halecki* case is in direct conflict with the Restatement of Torts, Vol. II, § 340, which states:

> "A possessor of land is not subject to liability to his licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by any dangerous condition thereon, whether natural or artificial, if they know of the condition and realize the risk involved therein."

Moreover, this application of *Halecki* cannot be reconciled with the recent decision of the Court of Appeals for the Second Circuit in *Filipek v. Moore-McCormack Lines* (2 Cir. 1958) 258 F. 2d 734, cert. denied (1959), 359 U.S. 927, where it was recognized that even under the liberal doctrines of the general maritime law a shipowner could not be held responsible to protect an employee of an independent contractor from the risks inherent in and created by the very work which he was performing on the vessel.

The Court of Appeals' interpretation of *Halecki* as establishing a basis for negligence liability in a situation where the risks are apparent to the person harmed can be supported only if *Halecki* extends the duties of a shipowner to include an obligation to supervise and control all details of the manner in which employees of an independent contractor perform their work, and to prevent

them from voluntarily selecting and continuing to use any unsafe method. The imposition of such a direct supervisory duty on a shipowner represents a momentous departure from the settled rule to the contrary in both the Second and Ninth Circuits. *Berti v. Compagnie Cyprien Fabre* (2 Cir. 1954) 213 F. 2d 397; *Lynch v. United States* (2 Cir. 1947) 163 F. 2d 97; *Freitas v. Pacific-Atlantic Steamship Company* (9 Cir. 1955) 218 F. 2d 562; *Vileski v. Pacific-Atlantic S. S. Co.* (9 Cir. 1947) 163 F. 2d 553; *The Daisy* (9 Cir. 1922) 282 Fed. [illegible]. See also *Hess v. United States* (9 Cir. 1958) 259 F. 2d 285, cert. granted (March 2, 1959), 359 U.S. 923; *West v. United States* (3 Cir. 1958) 256 F. 2d 671, cert. granted (March 2, 1959), 359 U.S. 924.

Petitioner respectfully urges that this Court exercise its power of review in this case because the application of its decision in *Halecki* has now led the Court of Appeals for the Ninth Circuit to render a decision plainly in conflict with established principles of negligence liability.

III.

THIS COURT SHOULD REAFFIRM THE PRINCIPLE THAT QUESTIONS OF PROXIMATE CAUSATION MUST BE DETERMINED AS A MATTER OF LAW WHERE FACTS ARE UNCONTROVERTED AND THEIR EFFECT IS NOT OPEN TO A REASONABLE DIFFERENCE OF OPINION.

Petitioner again refers to the Restatement of Torts, Vol. II, § 434, which provides:

> "It is the duty of the court to determine whether, upon the facts which are admitted, found by special verdict or reasonably inferable from the evidence,

the actor's conduct is a substantial factor in bringing about harm to another, unless the question is open to a reasonable difference of opinion, in which case it is to be left to the jury."

In this case the facts of the accident as stated by the plaintiff were not in dispute. These facts were set forth in the detailed allegations of two separate complaints, and at no time during the pendency of the action, including briefing and extensive argument in the District Court and briefing and argument in the Court of Appeals, was there any material change in the allegations themselves or in the nature of the facts asserted by plaintiff's counsel. The accident resulted, according to the facts admitted by the plaintiff, because her decedent and his fellow longshoremen elected to raise a load of dunnage weighing between one and two tons by means of straps which they intended and knew would break. Plaintiff affirmatively alleged that her decedent participated in this operation and the conclusion that he was or should have been aware of the risks involved is not open to doubt.[8]

On May 7, 1959 the Court of Appeals for the Ninth Circuit amended its opinion of April 23, 1959 to include a citation of this Court's decision in *Glus v. Brooklyn Eastern District Terminal* (April 20, 1959) ..... U.S. ....., 3 L. Ed. 2d 770. Presumably the *Glus* case was felt by the Court of Appeals to reinforce its view that the factual foundation presented by the record before it was too indefinite to support a ruling on the merits. Cf. *Conley*

[8]Petitioner suggests that the decedent was like a willing Damocles, whom Dionysius of Syracuse seated at a royal banquet beneath a sword hung by a single hair.

v. Gibson (1957) 335 U.S. 41, 47-48. Petitioner respectfully submits, however, that this is not a case which requires the development of further facts by way of discovery, pretrial or trial because the dispositive fact, i.e., the decedent's awareness of danger, has been repeatedly admitted and alleged by the plaintiff.

The asserted negligence of the shipowner in failing to provide band cutters cannot overcome the admitted fact which precludes any recovery in this case. This is clearly so under the law of California applicable to this case and it is equally so simply as a matter of proximate causation. *Jackson v. Pittsburgh S. S. Co.* (6 Cir. 1942) 131 F. 2d 668.

The imagination and ingenuity of lawyers, benefited by hindsight, can devise a factual theory in every shipboard accident to support the allegation that the accident would not have happened if the shipowner had done something differently. In this sense every accident is to some extent foreseeable. But "proximate cause" is an essential element of actionable negligence, and not all results which are to some extent foreseeable are necessarily proximate results. When the determinative facts are known or admitted, proximate cause is a matter of the extent of the legal duty involved and is to be determined by the court as a matter of law. *Moch v. Rensselaer Water Co.* (1928) 247 N.Y. 160, 159 N.E. 896.

To the extent that the Court of Appeals for the Ninth Circuit has found support in the decisions of this Court for its refusal to rule on the matter of proximate causation in the face of undisputed facts, the writ should be granted for the purpose of enabling this Court to reaffirm

the principle that such rulings are required under the circumstances presented by the record here.

CONCLUSION.

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated, San Francisco, California,
May 28, 1959.

Respectfully submitted,
FRANCIS L. TETREAULT,
Counsel for Petitioner.

ROBERT E. PATMONT,
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Of Counsel.

(Appendix Follows.)

Appendix

OPINIONS AND JUDGMENT OF THE COURT BELOW.

1. Opinion dated April 23, 1959.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARMIDA ALDRIDGE, *Appellant*, vs. STATES MARINE CORPORATION OF DELAWARE, a Corporation, *Appellee*.	No. 15,698 April 23, 1959

On appeal from the United States District Court for the Northern District of California, Southern Division, and on petition for rehearing.

Before POPE, HEALY and HAMLEY, Circuit Judges.

POPE, Circuit Judge.

After a decision in this case on March 16, 1959, a petition for rehearing was filed by appellee. The earlier opinion is withdrawn and the present one substituted therefor. Rehearing is denied.

Appellant, plaintiff below, brought this action as the widow and heir of William J. Aldridge, a longshoreman who died as the result of injuries he received while working as an employee of a stevedoring company in loading the S.S. Lone Star State, a ship owned and operated by the defendant corporation while the vessel was at berth at San Francisco. The action was brought in the Superior Court for the City and County of San Francisco, but removed to the court below on the petition of defendant on the ground of diversity of citizenship of the parties.

Upon motion of defendant, plaintiff's amended complaint was dismissed. Leave to file a second amended complaint was denied. Plaintiff then appealed here.[1]

The sole question is the sufficiency of the complaint to state a claim. After argument and submission of the appeal here, the parties forwarded to the court additional citations. Upon noting that certiorari had been granted by the Supreme Court in one of those cases, and that other cases involving questions similar to the ones argued here were pending in that Court, we vacated the submission pending decision by the Supreme Court, ordering that upon the handing down of that decision, the case would be deemed resubmitted. The cases referred to were decided by the Supreme Court on February 24, 1959. As some of them, hereafter cited, are clearly determinative of this case, we now proceed to state the reasons for our decision.[2]

The complaint sought damages for the alleged wrongful death of William J. Aldridge, the longshoreman. It is based upon §377 of the California Code of Civil Procedure, "permitting actions for damages for death caused by the wrongful act or neglect" of another.[3] It alleges that as Aldridge was performing his work of stowing the cargo being loaded, he and the other longshoremen with him required dunnage made up of sticks and boards, for use in wedging and stowage of the cargo. As the

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[1] After the order dismissing the complaint, plaintiff moved for an order setting aside the order of dismissal "and to permit plaintiff to file a second amended complaint herein." This was denied July 25, 1957. The notice of appeal was from the order of dismissal and from the order of July 25, 1957 denying this motion to set aside the order of dismissal. Under these circumstances it is clear the decision was a final one and hence appealable. See Asher v. Ruppo, 7 cir., 173 F. 2d 10, discussed in Williams v. Peters, 9 cir., 233 F. 2d 618.

[2] On March 2, 1959, the Supreme Court also granted certiorari in Hess v. United States, 9 cir., 259 F. 2d 285. We see no reason for further withholding decision here since the questions presented in that case do not resemble the problems now before us. The primary question in the Hess case was what law should govern liability, a matter not yet before us. The principal difference was that the Hess case was heard on evidence and decided on findings of fact. It was not disposed of by a dismissal based on the pleadings alone.

[3] "§377. . . . When the death of a person . . . is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death."

dunnage was lowered into the hold it was held in bundles by metal bands. The longshoremen asked the defendant's officers for band cutters to break the bands. The latter advised they had no cutters, but sent a carpenter with hammers to do that work. For a time this method of opening the bundles was provided. Later, when it became necessary to break the bands of additional dunnage, similar requests were made of defendant's officers, "but the defendants did negligently and carelessly . . . fail to provide or supply, either persons or proper means . . . and by reason thereof the one means and method remaining to said longshoremen . . . was to employ the hook secured to the winch, by inserting the same in the steel bands and thereafter raising the load of dunnage and attempting to break the steel bands by means of the weight of said dunnage, through raising the dunnage into the air and causing the weight thereof to break said straps; by reason of the aforesaid it was necessary to, and the said longshoremen did, use said method of breaking the dunnage straps for a period of several hours, during all of which the defendants negligently and carelessly failed to supply any band cutters, or any persons to cut or break said bands, and in the course of such operations, at approximately 1:55 o'clock a.m., upon the breaking of the bands of one of said dunnage loads several heavy timbers did break loose and did fall upon said William J. Aldridge, directly and proximately inflicting upon him serious and fatal injuries from which he died in route by ambulance to a hospital."

We think the complaint was sufficient to state a claim requiring the court to proceed to trial.

United Pilots Assn. v. Halecki, 359 U.S. ____, (Feb. 24, 1959), dealt with an action brought in federal court by reason of diversity of citizenship to recover for wrongful death, based on the New Jersey wrongful death act, and upon claims both of unseaworthiness and negligence. The tortious conduct charged to the vessel owners occurred on navigable waters in New Jersey. The Court of Appeals upheld recovery on either unseaworthiness or negligence. Halecki v. United New York & New Jersey S.H.P. Assn., 2 cir., 251 F. 2d 708. The Supreme Court disagreed as to the claim of unseaworthiness,[4] but approved the lower court's

[4]The reason given was that the work performed by the plaintiff was not the type of work traditionally done by seamen within the rule of Seas Shipping Co. v. Sieracki, 328 U.S. 85.

holding as to negligence, saying: "As to the claim based upon negligence, for which the New Jersey Wrongful Death Act clearly gives a right of action, we agree with the Court of Appeals that 'the evidence created an issue that could be decided only by a verdict.'"

The facts there have certain sharp resemblances to those alleged in the complaint here. The decedent Halecki was employed by an electrical contractor to work on defendant's ship's generators. Halecki and another were spraying the generators with carbon tetrachloride, a toxic compound. They knew it was an operation dangerous to humans if the fumes reached certain concentrations in the atmosphere. They took some precautions to procure ventilation, but there was evidence these were not "adequate to remove the fumes."

In each case, in Halecki and in this one, it could be said, in view of the risky procedures adopted by the subcontractor or the stevedoring company, as the Supreme Court did in the Halecki case: "It was for the triers of fact to determine whether the defendants were responsibly negligent in permitting or authorizing the method or manner of [their] use."

As was said in Conley v. Gibson, 355 U.S. 41, 45: "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Had the facts here been developed through a pretrial conference, or on trial, the degree of knowledge which the ship's officers had, after they refused further to furnish the carpenter and his hammers, that a less safe method was in use, would have been made apparent for evaluation by the judge and jury. "No conclusion in such a case should prudently be rested on an indefinite factual foundation." Kennedy v. Silas Mason Co., 334 U.S. 249, 256. It would be "good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record should present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts." Idem, p. 257. [Cf. Glus v. Brooklyn Eastern District Terminal, ... U.S. ..... (April 20, 1959).]*

*Added by amendment filed May 7, 1959.

The evidence which might be adduced under this complaint might even enhance the resemblance of the facts here to those in Halecki. It would appear then that Aldridge was in a position comparable to that of Halecki, of whom the Court of Appeals said (p. 711): "The deceased was certainly an 'invited person', or 'business guest,' and the shipowner was liable, not only for the negligence of the master, but, although the work was let out to a subcontractor, also for any lack of 'reasonable care to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities.' "[5]

We speak here of the shipowner's negligence.[6]

Appellee argues that the action is barred by contributory negligence. We think such argument is premature here. We have before us only the complaint. Normally the existence of contributory negligence is a question for a jury. That the complaint shows that Aldridge was present when the alleged unsafe practices were in progress does not require us, at this stage of the case, to say that Aldridge was necessarily negligent. Halecki was doing the spraying in that case, and he was "aware of the necessity of taking special precautions in undertaking the job." Yet no judge who participated in that case, either in the Court of Appeals, (including Judge Lumbard who dissented), or in the Supreme Court, suggested that Halecki was negligent as a matter of law. Even Judge Lumbard who in his dissent thought that contributory negligence was a defense, considered that the case should go back for a new trial "on the issue of negligence." (251 F. 2d 713)

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[5]The court was quoting from Restatement of Torts, Vol. II, §344, comment b.

[6]Plaintiff's original complaint contained two counts, one for unseaworthiness and one based on negligence. The unseaworthiness count was dropped, apparently on the assumption that the California Wrongful Death Act did not encompass such an action. Whether the remaining counts' allegations respecting a failure to supply means of cutting bands would measure up to an allegation of unseaworthiness under the second proposition stated in The Oseeola, 189 U.S. 158, 175, relating to "a failure to supply and keep in order the proper appliances appurtenant to the ship" is also a question we do not face here.

In making its argument that contributory negligence bars this action, appellee says, (a) an action under a state wrongful death act must be governed by state law, and (b) contributory negligence of deceased is a defense in such actions in California. Even if such were the whole of the applicable law here, we would not, for the reasons stated, in the preceding paragraph, assume to make a finding of contributory negligence at this, the pleading stage of this action. But appellee's statement of the law is incomplete. In its petition for rehearing, appellee asserts that in Halecki the Supreme Court "did not deal with the question of contributory negligence." On the contrary, the court made a significant statement on that point. It said: "For the reasons stated in M/V Tungus v. Skovgaard, decided today, we hold that the Court of Appeals was correct in viewing its basic task as one of interpreting the law of New Jersey. For reasons also stated in Tungus, we accept in this case the Court of Appeals' determination of the effect which New Jersey law would accord to the decedent's contributory negligence."

The determination of the Court of Appeals thus accepted was as follows: (251 F. 2d 713) "[W]e hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar." In that case the Court felt itself obliged to construe the New Jersey statute, although the courts of the state had never passed upon the question, for Halecki's case had been tried under instructions refusing to charge that contributory negligence was a bar.

In a similar manner the Supreme Court in M/V TUNGUS v. Skovgaard, 359 U.S. ....., (Feb. 24, 1959) refused to disturb the Third Circuit's interpretation of the New Jersey Wrongful Death Act as comprehending recovery for death of a longshoreman caused by unseaworthiness of a vessel. Said the Court: "Yet the fact is that the New Jersey courts have simply not spoken upon the question of whether in a case such as this maritime law or common law is applicable under the State's Wrongful Death Act. In sum, there is no way of knowing whether New Jersey would impose uniform legal standards throughout its jurisdiction, or would apply in this case rules different from those that would govern if, instead of meeting his death aboard the Tungus, Skovgaard had been killed on the adjacent dock. . . . The Court of Appeals, en banc, has given

careful consideration to the meaning of the state statute. We cannot say that its conclusion is clearly wrong. Therefore, despite the inherent uncertainties involved, we will not disturb that court's interpretation of the New Jersey law."

In M/V Tungus, as in Halecki, the court had to say what the New Jersey rule would be, for the issue had to be decided. But here, no California decision has been rendered on the matter and we are not yet called upon, or required, to interpret the California Wrongful Death Act to determine whether California "would impose uniform legal standards throughout its jurisdiction, or would apply in this case rules different from those that would govern if, instead of meeting his death aboard . . . [Aldridge] had been killed on the adjacent dock."[7] Before that question reaches the district court, after this remand, the California courts may have settled the question; or, on the trial below, the jury may find no negligence on the part of the defendant. It may well be that the issues stated in the complaint may be altered on pretrial or by amendment. We hold the question of whether the action is barred by contributory negligence is not now before us.

Reversed and remanded.

(Endorsed:) Opinion. Filed April 23, 1959.

Paul P. O'Brien, Clerk.

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[7]There is no point in attempting to predict what the California courts may decide. They might be persuaded that the reasoning followed by the Second Circuit in its construction of the New Jersey Act would appropriately be applied to the California Act; or they might be influenced by a consideration of the desirability of uniformity in the law relating to fatal and non-fatal injuries from maritime torts.

2. Opinion dated March 16, 1959.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARMIDA ALDRIDGE, *Appellant*, vs. STATES MARINE CORPORATION OF DELAWARE, a Corporation, *Appellee.*	No. 15,698 Mar. 16, 1959

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before POPE, HEALY and HAMLEY, Circuit Judges.

POPE, Circuit Judge.

Appellant, plaintiff below, brought this action as the widow and heir of William J. Aldridge, a longshoreman who died as the result of injuries he received while working as an employee of a stevedoring company in loading the S.S. Lone Star State, a ship owned and operated by the defendant corporation while the vessel was at berth at San Francisco. The action was brought in the Superior Court for the City and County of San Francisco, but removed to the court below on the petition of defendant on the ground of diversity of citizenship of the parties. Upon motion of defendant, plaintiff's amended complaint was dismissed. Leave to file a second amended complaint was denied. Plaintiff then appealed here.[1]

[1]After the order dismissing the complaint, plaintiff moved for an order setting aside the order of dismissal "and to permit plaintiff to file a second amended complaint herein." This was denied July 25, 1957. The notice of appeal was from the order of dismissal and from the order

The sole question is the sufficiency of the complaint to state a claim. After argument and submission of the appeal here, the parties forwarded to the court additional citations. Upon noting that certiorari had been granted by the Supreme Court in one of those cases, and that other cases involving questions similar to the ones argued here were pending in that Court, we vacated the submission pending decision by the Supreme Court, ordering that upon the handing down of that decision, the case would be deemed resubmitted. The cases referred to were decided by the Supreme Court on February 24, 1959. As some of them, hereafter cited, are clearly determinative of this case, we now proceed to state our reasons for our decision here.[1a]

The complaint sought damages for the alleged wrongful death of William J. Aldridge, the longshoreman. It is based upon §377 of the California Code of Civil Procedure, "permitting actions for damages for death caused by the wrongful act or neglect" of another.[2] The frame of the complaint in general parallels the fact

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of July 25, 1957 denying this motion to set aside the order of dismissal. Under these circumstances it is clear the decision was a final one and hence appealable. See Asher v. Ruppo, 7 cir., 173 F. 2d 10, discussed in Williams v. Peters, 9 cir., 233 F. 2d 618.

[1a] On March 2, 1959, the Supreme Court also granted certiorari in Hess v. United States, 9 cir., 259 F. 2d 285. We see no reason for further withholding decision here since the questions presented in that case do not resemble the problems now before us. The primary question in the Hess case was what law should govern liability, a matter not open to doubt here. Another difference was that the Hess case was heard on evidence and decided on findings of fact. It was not disposed of by a dismissal of the action.

[2] "§377 . . . When the death of a person . . . is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. . . ."

The latest word on the effect of a similar statute is in M/V TUNGUS v. Skovgaard, 359 U.S. . . ., decided February 24, 1959, as follows: "Obviously the New Jersey wrongful death statute embraces a claim for death negligently caused."

Plaintiff's original compliant contained two counts, one for unseaworthiness and one based on negligence. The unseaworthiness count was dropped from the amended complaint, counsel for plaintiff explaining to the court that it had been decided "that in a death action, we have the anomalous situation where a longshoreman's widow is not entitled to benefits of the doctrine of unseaworthiness." A few months after that statement was made, the court in Skovgaard v. The M/V TUNGUS, 3 cir., 252 F. 2d 14, 17, construed the New Jersey statute to reach an op-

situation presented in Pope & Talbot, Inc. v. Hawn, 346 U.S. 406. The injury on navigable waters makes the action one for a maritime tort. The suit under diversity jurisdiction does not alter or jeopardize the right of recovery. Pope & Talbot, Inc. v. Hawn, supra.[3] The substantive law governing plaintiff's right to recover is the same whether she sues on the "law side" or on the "admiralty side". The sufficiency of the complaint must be judged in the light of maritime law.

The complaint alleges that as Aldridge was performing his work of stowing the cargo being loaded, he and the other longshoremen with him required dunnage made up of sticks and boards, for use in wedging and stowage of the cargo. As the dunnage was lowered into the hold it was held in bundles by metal bands. The longshoremen asked the defendant's officers for band cutters to break the bands. The latter advised they had no cutters, but sent a carpenter with hammers to do that work. For a time this method of opening the bundles was provided. Later, when it became necessary to break the bands of additional dunnage, similar requests were made of defendant's officers, "but the defendants did negligently and carelessly . . . fail to provide or supply, either persons or proper means . . . and by reason thereof the one means and method remaining to said longshoremen . . . was to employ the hook secured to the winch, by inserting the same in the steel bands and thereafter raising the load of dunnage and attempting to break the steel bands by means of the weight of said dunnage, through raising the dunnage into the air and causing the weight thereof to break said straps; by reason of the aforesaid it was necessary to, and the said longshoremen did, use said method of breaking the dunnage straps for a period

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posite conclusion, and that was upheld in the case first cited in this note. In view of our disposition of this case, and the fact that the issues herein may be altered by amendment or pretrial, it might be profitable to reexamine the California statute in the light of the Tungus case, supra.

[3] In Allen v. Matson Navigation Company, 9 cir., 255 F. 2d 273, footnote 5 at p. 277, we had this to say: "As suggested in Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, even if this is to be regarded as a maritime tort plaintiffs were permitted to bring their suit alleging diversity of citizenship and demanding a jury by virtue of the 'saving to suitors' clause of Title 28 §1333, but it would not follow that defendant's liability would be measured by state law or common law standards.

of several hours, during all of which the defendants negligently and carelessly failed to supply any band cutters, or any persons to cut or break said bands, and in the course of such operations, at approximately 1:55 o'clock a. m., upon the breaking of the bands of one of said dunnage loads several heavy timbers did break loose and did fall upon said William J. Aldridge, directly and proximately inflicting upon him serious and fatal injuries from which he died en route by ambulance to a hospital."

We think the complaint was sufficient to state a claim requiring the court to proceed to trial.

United Pilots Assn. v. Halecki, 359 U.S. ___, (Feb. 24, 1959) dealt with an action brought in federal court by reason of diversity of citizenship to recover for wrongful death, based on the New Jersey wrongful death act, and upon claims both of unseaworthiness and negligence. The tortious conduct charged to the vessel owners occurred on navigable waters in New Jersey. The Court of Appeals upheld recovery on either unseaworthiness or negligence. Halecki v. United New York & New Jersey S.H.P. Assn., 2 cir., 251 F. 2d 708. The Supreme Court disagreed as to the claim of unseaworthiness,[4] but approved the lower court's holding as to negligence, saying: "As to the claim based upon negligence, for which the New Jersey Wrongful Death Act clearly gives a right of action, we agree with the Court of Appeals that 'the evidence created an issue that could be decided only by a verdict.'"

The facts there have certain sharp resemblances to those alleged in the complaint here. The decedent Halecki was employed by an electrical contractor to work on defendant's ship's generators. Halecki and another were spraying the generators with carbon tetrachloride, a toxic compound. They knew it was an operation dangerous to humans if the fumes reached certain concentrations in the atmosphere. They took some precautions to procure ventilation, but there was evidence these were not "adequate to remove the fumes."

In each case, in Halecki and in this one, it could be said, in view of the risky procedures adopted by the subcontractor or the stevedoring company, as the Supreme Court did in the Halecki

[4]The reason given was that the work performed by the plaintiff was not the type of work traditionally done by seamen within the rule of Seas Shipping Co. v. Sieracki, 328 U.S. 85.

case: "It was for the triers of fact to determine whether the defendants were responsibly negligent in permitting or authorizing the method or manner of [their] use."

"In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45. Had the facts here been developed through a pretrial conference, or on trial, the degree of knowledge which the ship's officers had, after they refused further to furnish the carpenter and his hammers, that a less safe method was in use, would have been made apparent for evaluation by the judge and jury. "No conclusion in such a case should prudently be rested on an indefinite factual foundation." Kennedy v. Silas Mason Co., 334 U.S. 249, 256. It would be "good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record should present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts." Idem, p. 257.

The evidence which might be adduced under this complaint might even enhance the resemblance of the facts here to those in Halecki. It would appear then that Aldridge was in a position comparable to that of Halecki, of whom the Court of Appeals said (p. 711): "The deceased was certainly an 'invited person' or 'business guest,' and the shipowner was liable, not only for the negligence of the master, but, although the work was let out to a subcontractor, also for any lack of 'reasonable care to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities.' "[5]

We speak here of the shipowner's negligence; and since Aldridge, like Hawn, was not a crew member, he may maintain a negligence action against the shipowner. Pope & Talbot, Inc. v. Hawn, supra, at p. 413. As in the case of Hawn, any contributory negligence on his part would operate only in mitigation of

[5]The court was quoting from Restatement of Torts, Vol. II, 344, comment b.

damages. Cf. Kermaree v. Transatlantique, 359 U.S. ___, (Feb. 24, 1959). Appellee argues that since plaintiff here had to rely on the California death statute the effect of contributory negligence must be governed by the law of California. In support of this it cites Curtis v. A. Garcia, 3 cir., 241 F. 2d 30. But in Halecki v. United New York & New Jersey S.H.P. Assn., supra, the court expressly disapproved of that case, (see 251 F.2d at p. 713), holding that the New Jersey statute "should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar". As we have seen, the Supreme Court, reviewing Halecki, accepted without exception the Court of Appeals' decision on the negligence aspects of that case. We see no reason to draw any different conclusion as to the California statute.

In Halecki neither the Court of Appeals nor the Supreme Court noted any problem of proximate cause. Nor do we see any here. That, like the question of reasonable care, is a question of fact.

Reversed and remanded.

(Endorsed:) Opinion. Filed Mar. 16, 1959.

Paul P. O'Brien, Clerk.

3. Judgment dated April 23, 1959.

United States Court of Appeals
for the Ninth Circuit

Armida Aldridge, Appellant, vs. States Marine Corporation of Delaware, a Corporation, Appellee.	No. 15,698

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellant and against the Appellee, and that this cause be, and hereby is remanded to the said District Court.

IT IS FURTHER ORDERED and adjudged by this Court that the Appellant recover against the Appellee for her costs herein expended and have execution therefor.

(ENDORSED) Judgment
Filed and entered: April 23, 1959
Paul P. O'Brien, Clerk

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FILED
JUN 29 1958
JAMES R. BROWNING, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. [redacted] 87

STATES MARINE CORPORATION OF DELAWARE, a Corporation,

Petitioner;

vs.

ARAHIDA ALDRIDGE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
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GLADSTEIN, ANDERSEN, LEONARD & SIBBETT;
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